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January 2, 2007

OUR FILE NUMBER
394208-061

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VIA HAND DELIVERY

Honorable Ronald M. George
Chief Justice of the State of California
and the Honorable Associate Justices
of the California Supreme Court
350 McAllister Street
San Francisco, California 94102-7303

Re: Response of American Honda Motor Co., Inc. to Letters Requesting Depublication of *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824 (2006) (Cal. App. Case No. B186402)

Dear Chief Justice George and Associate Justices:

Pursuant to California Rule of Court 979(b), Defendant and Respondent American Honda Motor Co., Inc. ("Honda") submits this opposition to the separate requests of Plaintiffs and non-parties The Center for Auto Safety ("CAS"), Consumers for Auto Reliability and Safety ("CARS"), and Consumer Federation of California ("CFC") for an order directing depublication of the California Court of Appeal's opinion in *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824 (2006) ("*Daugherty*").

Daugherty analyzed and applied well-settled California law on the CLRA and UCL in a straightforward manner without altering, disregarding, ignoring or in any way disrupting existing California jurisprudence addressing these statutes. With regard to *Daugherty's* analysis of Plaintiffs' claim for breach of express warranty, the Court held that an alleged "latent" automobile defect, that manifests (if at all) outside the time and mileage limits of a manufacturer's written warranty, does not give rise to a breach of express warranty claim.[1] The

[1] On this issue, *Daugherty* found that, "as a matter of law, in giving its promise to repair or replace any part that was defective in material or workmanship and stating that car was covered for three years or 36,000 miles, Honda 'did not agree, and plaintiffs did not understand it to agree, to repair latent defects that lead to a malfunction after the term of the warranty." *Daugherty*, 144 Cal. App. 4th at 832. As the Court of Appeal noted, this issue has been addressed by numerous courts outside California, which like the Court of Appeal, have applied the "general rule" that "an express warranty 'does not cover repairs made after the applicable time or mileage periods have elapsed.'"

depublication requests simply highlight the disagreement of Plaintiffs and non-parties CAS and CFC with *Daugherty* – not any valid flaw in the Court of Appeal's analysis or in its application of California law. The Court of Appeal's well-reasoned and sound opinion merits publication.

I. *Daugherty* Applies Well-Settled California Law On The CLRA To The Facts Before It.

Daugherty did not announce any "novel" rule with respect to the CLRA. Instead, *Daugherty* relied on the unremarkable and well-settled principle – announced over thirty years ago in *Outboard Marine Corp. v. Sup. Ct.*, 52 Cal. App. 3d 30 (1975) – that "the CLRA proscribes a concealment of characteristics or quality 'contrary to that represented . . . .'" *Daugherty*, 144 Cal. App. at 834 (citing *Outboard Marine*, 52 Cal. App. 3d at 37). Plaintiffs' misleading characterization of *Daugherty* overlooks that the decision closely tracks the holdings of *Outboard Marine* and other California decisions that Plaintiffs themselves cited in the Court of Appeal and trial court.

First, *Daugherty* expressly stated that it "do[es] ***not*** disagree with *Outboard Marine* . . . ." 144 Cal. App. 4th at 834 (emphasis added). Instead, quoting *Outboard Marine*, the Court of Appeal agreed "that the practices proscribed by the CLRA—specifically, 'representing that goods . . . are of a particular standard, quality, or grade, . . . if they are of another' [. . .]—include[] 'a proscription against a concealment of the characteristics, use, benefit, or quality of the goods *contrary to that represented.*'" *Id.* (emphasis added). *Daugherty* also agreed "'that every affirmative misrepresentation of fact works a concealment of a true fact.'" *Id.* Thus, far from precluding any CLRA concealment claim, *Daugherty* found that "although a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of fact the defendant was obliged to disclose." *Daugherty*, 144 Cal. App. 3d at 835. Ultimately, *Daugherty* concluded that Plaintiffs' CLRA claim failed because they did not allege "any representation by Honda that its automobiles had any characteristic they do not have, or are of a standard or quality they are not" especially since "[a]ll of [P]laintiffs' automobiles functioned as represented through their warranty periods, and indeed many still have experienced no malfunction." *Daugherty*, 144 Cal. App. 4th at 834.

Second, *Daugherty* is consistent with *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255 (2006), a recent California Court of Appeal decision that reaches precisely the same conclusion on the same issue. Like *Daugherty*, *Bardin* upheld the trial court's dismissal of a CLRA claim where plaintiffs did not allege facts showing defendant was either "bound to disclose" an alleged defect, or that defendant gave any information of other facts which could have the likely effect of misleading the public "for want of communication." *Bardin*, 136 Cal. App. 4th at 1276. Analogizing the facts before it to those in *Bardin*, the Court of Appeal found that Plaintiffs did not allege facts "that would establish Honda was 'bound to disclose' the defect

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Daugherty, 144 Cal. App. 4th at 830 (citations omitted).

in the F22 engine," or facts "which show Honda 'ever gave any information of other facts which could have the likely effect of misleading the public 'for want of communication of' the defect in the F22 engine; [Plaintiffs'] complaint 'did not allege a single affirmative representation' by Honda regarding the F22 Engine." *Daugherty*, 144 Cal. App. 4th at 836-37 (citing *Bardin*, 136 Cal. App. 4th at 1276).

Third, *Daugherty* does not "rule" that "a manufacturer has no duty to disclose the existence of a defect if the risk it poses to consumers is 'merely the risk of 'serious potential damages' – namely, the cost of repairs," or that "a consumer has no claim under the CLRA for the concealment of a product defect unless . . . the defect the manufacturer has concealed poses a threat of physical injury or raises other safety concerns." (Plaintiffs' Letter at 3.) Reading the passage Plaintiffs selectively quote in context, it becomes readily apparent that the Court of Appeal was merely addressing *Plaintiffs' argument* that Honda had a "duty to disclose" because the alleged product defect raised "safety" concerns, an argument the Court of Appeal dismissed because Plaintiffs' complaint did not allege a safety defect:

> Daugherty asserts the complaint alleges facts showing Honda had a duty to disclose the alleged defect . . . and "made affirmative representations at the time of sale and thereafter" thus meeting the standards stated in *Bardin*. Neither assertion is correct. Daugherty alleged no facts that would establish Honda was "bound to disclose" the defect in the F22 engine. . . . Daugherty claims the complaint alleges Honda's knowledge of "unreasonable risk" to plaintiffs at the time of sale, but the "unreasonable risk" alleged is merely the risk of "serious potential damages"—namely, the cost of repairs in the event the defect ever causes an oil leak. The sole allegation mentioning "safety" is the paragraph claiming punitive damages, and that paragraph merely asserts a legal conclusion: that Honda's conduct was "carried on with a willful and conscious disregard for the safety of Plaintiffs and others, entitled Plaintiffs to exemplary damages under Civil Code § 3294.

Daugherty, 144 Cal. App. 4th at 836.

Finally, although California's consumer protection laws are broadly written to permit courts to restrain dishonest or unfair business dealings, their scope is not unlimited. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 183 (1999). There is no indication that the California legislature intended to permit consumers to spring past valid limitations on express warranties by simply couching such warranty claims as CLRA or UCL violations. *Daugherty* struck a balance between these objectives by recognizing that certain acts of concealment may be actionable under the CLRA, but ultimately found that such circumstances are absent in this case.

II. *Daugherty* Does Not Disrupt Existing California UCL Caselaw.

Plaintiffs mischaracterize *Daugherty*'s holdings under the UCL. *Daugherty* does not "encourage" deception of California consumers. To the contrary, applying existing California UCL authority, *Daugherty* examined Plaintiffs' allegations under the unlawful, unfair, and fraudulent prongs of the UCL and found that Plaintiffs failed to plead a UCL violation.

First, *Daugherty* correctly held that Plaintiffs have not alleged any "unlawful" conduct under the UCL. This Court has held that conduct is "unlawful" under the UCL if it violates some other law. *See Cel-Tech*, 20 Cal. 4th at 180. Consistent with this holding, the Court of Appeal found that Plaintiffs' failure to allege facts constituting a violation of some other law means there is no "unlawful" conduct under the UCL. *Daugherty*, 144 Cal. App. 4th at 837.

Second, *Daugherty* also correctly found that Honda did not engage in any fraudulent conduct. The Court of Appeal noted that "'[i]n order to be deceived, members of the public must have had an expectation or an assumption about' the matter in question." *Id.* at 838 (citations omitted). After a thorough examination of the facts alleged by Plaintiffs, the Court of Appeal found that "[t]he only expectation buyers could have had about the [subject] engine was that it would function properly for the length of Honda's express warranty, ***and it did.***" *Id.* The Court of Appeal further noted that "Honda did nothing that was likely to deceive the general public by failing to disclose that its . . . engine ***might***, in the fullness of time, eventually dislodge the front balancer shaft oil seal and cause an oil leak." *Id.* (emphasis added). This holding hardly constitutes an endorsement to deceive consumers. The only promise Honda made to consumers was that its vehicles would function properly during its express warranty period, and Plaintiffs in their complaints did not allege otherwise.

Third, *Daugherty* rejected any liability under the "unfair" prong of the UCL, applying *Camacho v. Automobile Club of Southern Calif.*, 142 Cal. App. 4th 1394 (2006). The Court found that Plaintiffs failed to allege any facts which, if proven, would make Honda's conduct "unfair" within the meaning of the UCL because "the injury to consumers is not substantial, if indeed it can be characterized as a cognizable injury at all." *Daugherty*, 144 Cal. App. 4th at 839. The Court also stated that it would have reached the same result had it applied "any of the tests that other courts of appeal have employed to determine whether a business act or practice is unfair within the meaning of the UCL." *Id.* at 839, n. 9.[2]

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[2] Non-parties incorrectly assert that *Daugherty* immunizes manufacturers from liability under the CLRA or UCL for fraudulent conduct so long as the alleged defect fails to manifest during the term of the express warranty. (CARS and CFC Letter at 4.) Not so. *Daugherty's* findings under the CLRA and UCL hinge on Plaintiffs' failure to allege any actionable representation by Honda, or facts demonstrating that Honda's conduct was "likely to deceive" consumers. By contrast, *Khan v. Shiley, Inc.*, 217 Cal. App. 3d 848 (1990) and *Robinson Helicopter Co., Inc. v. Dana*, 34 Cal. 4th 979 (2004), cited by non-parties but not by Plaintiffs in their briefing below, both involved alleged affirmative misrepresentations, and addressed the issue of whether product malfunction is a prerequisite for a fraud claim.

III. *Daugherty* Correctly Finds That "Latent" Defects That Manifest (If At All) Outside A Manufacturer's Limited Warranty Period Cannot Form The Basis Of Any Breach Of Express Warranty Claim.

Non-parties CAS, CARS, and CFC focus their requests for depublication on *Daugherty's* breach of express warranty findings that Plaintiffs *failed to challenge* in their Petition for Review. Non-parties accuse the Court of Appeal of overlooking "facts" that Plaintiffs did not allege in any of their three complaints in the trial court, and disregarding caselaw Plaintiffs failed to cite in any of their briefs.

First, *Daugherty* did not create any "confusion" with respect to California warranty law because of its holding that an alleged "latent" defect in automobiles, that manifests (if at all) outside a manufacturer's limited warranty period, cannot form the basis of a valid breach of express warranty claim. The Court of Appeal's careful and measured analysis of this issue is consistent with the "general rule" announced by other jurisdictions, which have "expressly rejected the proposition that a latent defect, discovered outside the limits of a written warranty, may form the basis for a valid express warranty claim . . . ." *Daugherty*, 144 Cal. App. 4th at 830 (citations omitted).

Second, the standard non-parties advocate for express warranty claims would completely obliterate the time and mileage limitations manufacturers are entitled to place on their express warranties. According to non-parties, "[t]he buyer of a new car should expect that its useful life *will exceed five years.*" (CAS letter at 6 (emphasis added)). Non-parties therefore urge a rule that, regardless of the time and mileage limitations for an express warranty, a manufacturer is obligated to repair vehicles up to a vehicle's "useful life." Non-parties cite no support, and there is none, for such a radical re-write of the law of express warranties, which provides that term-limited express warranties are valid and enforceable.

Third, *Daugherty* does not "ignore" or "conflict" with any existing California authority. Justice Boland, who wrote the *Daugherty* opinion, was part of the unanimous panel that decided *Hicks v. Superior Court Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908 (2001), on which non-parties rely. Thus, there can be little doubt that the Court of Appeal was mindful of *Hicks* when it decided *Daugherty*. Moreover, *Hicks* is easily distinguished on its facts. *Hicks* involved alleged defects in home foundations, not cars. As *Hicks* notes, this difference is significant because "[f]oundations . . . are not like cars or tires. Cars and tires *have a limited useful life.* At the end of their lives they, and whatever defect they may have contained, wind up on a scrap heap. If the defect has not manifested itself in that time span, the buyer has received what he bargained for." *Id.* at 923 (emphasis added).[3]

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[3] Non-parties also point to *Anthony v. General Motors Corp.*, 33 Cal. App. 3d 699 (1973), and *Aas v. Sup. Ct.*, 24 Cal. 4th 627 (2000), which, according to non-parties, were relied upon in the *Hicks* decision. However, both cases are inapposite. *Anthony* did not involve a manufacturer's term-limited express warranty. Rather, the court found that an express warranty arose out of GM's advertisements and owners manual representations concerning the weight bearing capacity of the wheels at issue. 33 Cal. App. 3d at 706-07. As to *Aas*, the *Hicks* decision readily

CONCLUSION

A careful review of the Court of Appeal's measured and deliberative approach in *Daugherty* highlights that the decision is a far cry from the revisionist image Plaintiffs and non-parties paint in their depublication requests. *Daugherty* applies existing California UCL and CLRA caselaw to the facts before it, while aligning itself with the great majority of jurisdictions on an express warranty issue novel to California courts. Honda, therefore, respectfully requests that the Court deny the depublication requests of Plaintiffs and their supporters.

Respectfully submitted,

Wallace M. Allan
of O'MELVENY & MYERS LLP

WMA:EYK

cc: Attached Service List

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acknowledges that *Aas* did not address any express warranty issue, much less the specific issue decided by *Daugherty*: "because the trial court had not precluded the plaintiffs in *Aas* from introducing evidence of economic damages in support of their breach of express warranty claims, *the Supreme Court had no occasion to address the specific issue raised in the case before us.*" *Hicks*, 89 Cal. App. 4th at 919 (emphasis added).

PROOF OF SERVICE

I, Sharon Nicholson, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 South Hope Street, Los Angeles, California 90071-2899. On January 2, 2007, I served the within documents:

> Letter from Wallace M. Allen regarding Response of American Honda Motor Co., Inc. to Letters Requesting Depublication of *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824 (2006) (Cal. App. Case No. B186402)

by putting a true and correct copy thereof, together with an unsigned copy of this declaration, in a sealed envelope designated by the carrier, with delivery fees paid or provided for, for delivery the next business day to the person(s) listed above, and placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by Worldwide Network, Inc., which is an express carrier.

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Court of Appeal, State of California Second
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I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on January 2, 2007, at Los Angeles, California.

Sharon Nicholson

Sharon Nicholson